

grievance filed was a "group grievance" under Article VII(B)(4)(b) of the labor agreement; (2) only grievants who sign a "group grievance" and supply their check number are entitled to relief; (3) the arbitrator's award demonstrated a "clear infidelity" to the labor agreement insofar as only grievants who sign a grievance and provide their check number are entitled to relief; and (4) AK Steel had not otherwise waived its contention that only grievants who had signed the "group grievance" and provided their check numbers were entitled to relief because AK Steel was not aware that the grievance sought relief for all apprentices, present and future, including apprentices who had not signed the grievance, and including apprentices who had signed the grievance but did not provide their check number. App. pp. 1a - 13a.

### **REASONS FOR GRANTING THE PETITION**

The AEIF petitions for a writ of certiorari because the decision of the Sixth Circuit is in direct conflict with relevant decisions of this Court. Specifically, the Sixth Circuit decision violates the well-established principle repeatedly articulated by this Court regarding the limited role that courts play in reviewing labor arbitration decisions:

As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

*United Paperworkers Int'l Union v. Misco, Inc.* 484 U.S. 29, 38 (1987). See also *Major League Baseball*

*Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000); *W.R. Grace and Co. v. Local Union 759, Int'l. Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757 (1983). In refusing to enforce the arbitrator's award, not only did the Sixth Circuit fail to defer to the arbitrator's interpretation of the labor agreement, it proceeded to found its decision upon its own interpretation of the labor agreement.

This Court repeatedly has emphasized that courts play a very limited role in reviewing labor arbitration decisions. See, e.g., *Misco, supra*, 484 U.S. at 36; *Garvey, supra*; *Eastern Associated Coal, supra*. An arbitrator's award is valid so long as it "draws its essence from the collective bargaining agreement" rather than being the arbitrator's "own brand of industrial justice." *Misco, supra*, 484 U.S. at 36, quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept." *Misco, supra*, 484 U.S. at 37-8.

Here, the Sixth Circuit relied upon a purportedly narrow exception to the rule that a reviewing court must defer to an arbitrator's factual findings and contractual interpretation in finding that the arbitrator's award "demonstrates a 'clear infidelity' to the agreement itself." App. p. 8a. Despite the fact that the arbitrator expressly referenced five separate Articles of the labor agreement, App. pp. 34a - 39a, and despite the court's express finding that the arbitrator "may have been aware of various provisions of the CBA, and indeed, relied on some of those provisions,"

App. p. 8a, the Sixth Circuit nonetheless undertook to determine whether the award "conflict[ed] with [other] express terms of the agreement" never brought to the attention of the arbitrator. In so doing, the court opened the door to *de novo* fact finding and interpretation of the labor agreement.

The court engaged in impermissible fact finding and interpretation of the labor agreement by concluding that the grievance was a "group grievance" subject to the constraints of Article VII (B) (4) (b) of the labor agreement, despite the fact that this contention never was raised before the arbitrator. Article VII (B) (4) (b) permits representative or "group" grievances signed by "at least one of the aggrieved parties" provided a list of the names and check numbers of all aggrieved employees later is submitted at or before a Step II grievance hearing. App. p. 55a. The court failed to note that under Article VII (E) (5), multiple employees may sign and file a grievance without providing check numbers. App. 59a. Thus, in undertaking its own interpretation of the labor agreement, the court divested 86 apprentices who signed the grievance, but did not provide their check number, of a remedy.

The court engaged in further fact finding and contract interpretation by entertaining AK Steel's argument that non-signatory apprentices likewise were not entitled to a remedy, again despite the fact that this contention never was raised before the arbitrator. And in rejecting the AEIF's contention that AK Steel had waived its procedural objections to the scope of the grievance by failing to raise such contentions before the arbitrator, the Court engaged in further fact finding in reaching its conclusion that AK Steel was not on notice in the arbitration proceeding (despite the wording of,

and signatures upon, the grievance itself) that the grievance sought relief for any but the 87 grievants who signed the grievance *and* provided their check numbers.

Under this Court's precedent, upon determining that the arbitrator interpreted the labor agreement, correctly or not, the Sixth Circuit's inquiry should have ended with an order of enforcement. Alternatively, upon the perception that the arbitrator's decision may have conflicted with another provision of the labor agreement, a determination itself dependent upon interpretation of the labor agreement, the court should have remanded the case back to the arbitrator. *Garvey, supra*, 532 U.S. at 511. In either event, the decision of the Sixth Circuit stands in clear contradiction of the precedent of this Court.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-4110

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

ARMCO EMPLOYEES INDEPENDENT  
FEDERATION, INC.,  
Plaintiff-Appellee,

v.

AK STEEL CORPORATION,  
Defendant-Appellant

August 17, 2005, Filed

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**COUNSEL:** For ARMCO EMPLOYEES INDEPENDENT FEDERATION, Inc., Plaintiff - Appellee: Robert H. Mitchell, Emily T. Supinger, Manley & Burke, Cincinnati, OH.

For AK STEEL CORPORATION, Defendant -  
Appellant: Gregory P. Rogers, Rachel S. Zahniser, Taft,  
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**JUDGES:** Before: BATCHELDER, GIBBONS and  
McKEAGUE, Circuit Judges.

**OPINION BY:** McKEAGUE

**OPINION: McKEAGUE, Circuit Judge.** Defendant-appellant, AK Steel Corp. ("AK Steel"), appeals the district court's grant of partial summary judgment in favor of Plaintiff-Appellee, Armco Employees Independent Federation ("AEIF" or the "Union"). AEIF filed this action against AK Steel to enforce an arbitration award pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The district court granted, in part, plaintiff's motion for summary judgment on the basis that AK Steel waived the right to assert that the Arbitrator's award applied only to employees who complied with grievance procedures under the Collective Bargaining Agreement ("CBA"). For the following reasons, we reverse the district court's order granting partial summary judgment in favor of AEIF and remand for further proceedings consistent with this opinion.

## **I. FACTUAL AND PROCEDURAL HISTORY**

This dispute between AEIF and AK Steel arose from AK Steel's decision, effective October 1, 2001, to terminate a paid transportation program for apprentices attending training classes at Sinclair Community College in Dayton, Ohio. AK Steel provided transportation to all apprentices from its Middletown,

Ohio facility to the training classes and paid for travel time for over two years prior to October 2001. AK Steel discontinued the paid transportation program in order to cut costs. This decision affected over 300 apprentices.

On or about October 1, 2001, a group of apprentices filed a grievance, Grievance No. 01-X-453, seeking reinstatement of the transportation service and paid travel time, as well as monetary damages. The CBA generally requires that grievances originate with and be signed by the employees involved. An exception applies to the processing of group grievances. Group grievances must be signed by a union representative and at least one of the aggrieved parties. Group grievances further require that "the names (and check numbers) of all employees alleged to be aggrieved must be identified and submitted with the grievance at the time of the filing or appeal to Step II [of the grievance procedure]." Deviations from the group grievance procedures "must be approved by Industrial Relations." Industrial Relations did not approve any deviation here. Eighty-seven apprentices signed Grievance No. 01-X-453 and provided their check numbers on the grievance. Eighty-six apprentices signed the grievance without providing their check numbers.<sup>1</sup>

AEIF initiated arbitration proceedings after AK Steel denied Grievance No. 01-X-453 on February 6, 2002. The parties participated in an arbitration hearing before an Arbitrator in August 2002. After the hearing, the parties simultaneously submitted briefs on September 26, 2002. In its post-hearing brief, AEIF argued that all apprentices, including those who did not comply with grievance procedures, should be compensated for their out-of-pocket transportation

expenses. On October 17, 2002, the Arbitrator issued an Opinion and Award sustaining the grievance. The Arbitrator recognized in the Opinion and Award that Grievance 01-X-453 was filed by "some of the apprentices." In issuing his award, the Arbitrator cited five provisions of the CBA. None of the provisions cited by the Arbitrator specifically govern the grievance procedure.

The Arbitrator ordered AK Steel to reinstate the paid transportation program and to "make whole all apprentices for travel time and out of pocket transportation expenses" incurred after the company terminated the transportation program. After the award, a dispute arose over whether the Arbitrator provided his award to all apprentices, or only those who complied with the grievance procedures as required by the CBA. AK Steel reinstated the transportation program for all apprentices after the Arbitrator issued his award. AK Steel paid damages to only those eighty-seven grievants who signed the grievance and provided their check numbers.

On January 28, 2003, AEIF filed suit in the district court against AK Steel requesting that the court enforce the Arbitrator's Opinion and Award. On December 3, 2003, the parties filed cross motions for summary judgment. On August 3, 2004, the district court entered an order and judgment denying AK Steel's motion for summary judgment and granting in part and denying in part AEIF's motion for summary judgment. The district court held that AK Steel failed to raise the issue of compliance with the CBA group grievance procedures to the Arbitrator, that it was foreseeable that the Arbitrator might award monetary

relief to all apprentices if he sustained Grievance No. 01-X-453, and therefore, AK Steel had waived its objection. The district court ordered AK Steel to "make whole all apprentices for travel time and out of pocket transportation expenses, including but not limited to mileage, gas and parking expenses incurred after the 1 October 2001 termination of the Company provided and paid transportation." AK Steel instituted this appeal on August 8, 2004.

## II. STANDARD OF REVIEW

We review a district court's denial and grant of summary judgment in labor arbitration cases *de novo*. *Monroe Auto Equip. Co. v. Int'l Union, UAW*, 981 F.2d 261, 265 (6th Cir. 1992). Our scope of review, however, is extremely limited. *Id.* The arbitrator's award must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. *See id.* at 265-67. "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987). The question of waiver is one of mixed law and fact. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 n.3 (6th Cir. 2003). Here, where the underlying facts are not in dispute, all issues are reviewed *de novo*. *See Sandier v. All Acquisition Corp.*, 954 F.2d 382, 385 (6th Cir. 1992).

## III. DISCUSSION

**A. The district court erred in enforcing an interpretation of the Arbitrator's award that exceeded the Arbitrator's authority under the CBA.**

"Federal law governs the enforcement and interpretation of collective bargaining agreements under § 301 of the [LMRA], but traditional rules of contract interpretation apply insofar as they are consistent with federal labor policies." *Int'l Bhd. of Teamsters, Local 519 v. UPS*, 335 F.3d 497, 506-07 (6th Cir. 2003)(citing *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983)). "To discern the intent of the parties, we consider the explicit language of a collective bargaining agreement in the context that gave rise to its inclusion and in the context of the entire agreement." *Id.* at 506. The agreement "must be construed so as to render [no term] nugatory and [to] avoid illusory promises." *Yard-Man*, 716 F.2d at 1480. An arbitration award fails when: (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement. *United Parcel Serv.*, 335 F.3d at 507 (citing *UAW v. Dana Corp.*, 278 F.3d 548, 554 (6th Cir. 2002) (quotation omitted)).

Arbitrators are confined to interpretation and application of the collective bargaining agreement. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960). In order to determine whether an arbitrator's decision "drew its essence" from the contract, we must

consider "whether the language of the contract at hand is sufficiently clear so as to deny the arbitrator the authority to interpret the agreement as he did." *Bruce Hardwood Floors v. S. Council of Indus. Workers*, 8 F.3d 1104, 1108 (6th Cir. 1993) (citation omitted).

AEIF argues that the award should be enforced, due to the deferential standard of review, as the Arbitrator cited and relied upon five separate articles of the CBA. AEIF argues that any misapplication of the provisions in the CBA is irrelevant, as an award should be upheld if the arbitrator was arguably applying the contract. *Misco*, 484 U.S. at 38. AEIF further argues that the Arbitrator was fully cognizant of the fact that the grievance was filed by only some of the apprentices, and that he was aware that the grievance sought relief on behalf of all apprentices.

AK Steel argues that the grievance procedure, under the CBA, requires strict compliance with that procedure. The proper procedures include, *inter alia*, placing the aggrieved employee's name and check number on the grievance. AK Steel argues that the Arbitrator exceeded his authority by granting an award to those apprentices who did not comply with the grievance procedures as outlined in the CBA. According to AK Steel, limiting monetary relief to the group grievants who complied with the grievance procedure is consistent with the express terms of the CBA as well as the rule that "arbitrators exceed their powers when they determine rights and obligations of individuals who are not parties to the arbitration proceedings." *NCR Corp. v. Sac-Co, Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995).

In arbitration between the same parties in 1986, a different arbitrator issued an award to "all employees," but recognized in a supplemental award that "all" referred to all employees who filed a proper grievance. The arbitrator noted that he would exceed the scope of his authority if he found that "all" meant non-grievants, as this would allow the Union to pursue grievances in a representative capacity. In 1992, a different arbitrator awarded relief, in a similar situation, to only those grievants who properly complied with grievance procedures. While former arbitrators' decisions are not binding on this panel, they are instructive for purposes of determining the proper scope of the Arbitrator's authority and award.

The provisions on which the Arbitrator relied have little relevance to the issues raised herein, as the provisions involve maintenance of the apprenticeship program and general concerns regarding the bargaining process. Limiting relief to those apprentices who properly complied with the group grievance procedure is consistent with the terms of the CBA and the rule that "arbitrators exceed their powers when they determine rights and obligations of individuals who are not parties to the arbitration proceedings." *Id.* The Arbitrator's award to all the apprentices demonstrates a "clear infidelity" to the agreement itself. *Nat'l Post Office Mailhandlers v. United States Postal Serv.*, 751 F.2d 834, 842 (6th Cir. 1985). Only eighty-seven apprentices complied with the group grievance procedure. While the Arbitrator may have been aware of various provisions of the CBA, and indeed, relied on some of those provisions, it is not clear, in granting his award, that he took those provisions of the CBA dealing with the proper grievance procedure into

account or applied those provisions to this case. See *Alken-Ziegler, Inc. v. UAW, Local Union 985*, 134 Fed. Appx. 866, 2005 U.S. App. LEXIS 9662, No. 04-1193, 2005 WL 1285746 (6th Cir. May 23, 2005) (vacating arbitration award where arbitrator failed to enforce unambiguous language of labor contract); see also *Int'l Union of Elec. Workers, Local 791 v. Hurd Corp.*, 7 Fed. Appx. 329, 334, 2001 WL 210578 (6th Cir. 2001) (reversing district court's grant of summary judgment where arbitrator's decision clearly conflicted with terms in the collective bargaining agreement); *Ficks Reet' Co. v. Local Union 112 of Int'l Union, etc.*, 965 F.2d 123, 126 (6th Cir. 1992) (finding that the arbitrator exceeded his authority by ignoring the express terms of an agreement).

Enforcement of the arbitration award to all apprentices affected by AK Steel's decision to stop providing transportation conflicts with the plain language of the CBA. The arbitration award conflicts with the terms of the CBA, as it awards monetary relief to those apprentices who did not fulfill the grievance requirements under the CBA. Allowing such relief would permit the Union to bring collective or "representative" grievances. Such an interpretation of the CBA runs counter to the parties' intent in entering into an agreement that sets forth such detailed provisions for filing grievances. Therefore, even giving due deference to the Arbitrator's decision as required by *Monroe Auto Equip.*, we conclude that the Arbitrator's award did not "draw its essence" from the CBA and the Arbitrator exceeded his authority in awarding monetary relief to all apprentices.

**B. The district court erred in finding that AK Steel waived its objection at the hearing to an award to persons who did not comply with the CBA's grievance procedures.**

AEIF contends that AK Steel waived its argument that the Arbitrator could only issue a monetary award to the group grievants. AK Steel contends that it had no opportunity to raise this issue at the arbitration hearing, as it was not on notice that AEIF sought an award as to all apprentices until the parties simultaneously submitted post-hearing briefs.

Generally, arguments not presented to an arbitrator are deemed waived and cannot be raised for the first time in an enforcement action in a district court. *See, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003) (stating that a party may waive objection to the jurisdiction of arbitrators); *U.S. Postal Serv.*, 751 F.2d at 841 n.4 (explaining that one who fails to object promptly to procedural errors made at an arbitration hearing waives the right to later assert those errors); *Order of Ry. Conductors & Brakemen v. Clinchfield R.R. Co.*, 407 F.2d 985, 988 (6th Cir. 1969) ("Defects in proceedings ... during arbitration may be waived by a party's acquiescence in the arbitration with knowledge of the defect.").

AEIF relies on *Chicago Newspaper Guild v. Field Enterprises, Inc.*, 747 F.2d 1153 (7th Cir. 1984), in support of its position that AK Steel waived its argument relative to the monetary award to non-grievants. AEIF's reliance on *Chicago Newspaper* is misplaced, as *Chicago Newspaper* involved a case where the defendant failed to raise an issue at the

arbitration hearing, of which it had actual notice prior to the hearing. *Id.* at 1158. In this case, AK Steel was not on notice that the Arbitrator might award monetary relief to apprentices who did not fully comply with the grievance procedure.

The district court held that AK Steel had a duty to "present to the arbitrator all foreseeable restrictions on his authority to fashion a reasonable remedy, including those based on the express terms of the CBA." The district court relied on cases from the Seventh and Fourth Circuits in reaching this conclusion. First, the district court relied on *UFCW Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340 (7th Cir. 1991), where the arbitrator ordered the company to reinstate the discharged grievant and make him whole. The court found that reinstatement and back pay were common awards in wrongful discharge cases, and therefore, the employer should have objected to the potential back pay award to the arbitrator. *Id.* at 1345. The court also noted that the parties "cannot be expected to anticipate every possible defense or datum that might influence an arbitrator's award." *Id.* at 1344-45. Second, the district court relied on *United Food & Comm. Workers v. Marval Poultry Co., Inc.*, 876 F.2d 346, 352 (4th Cir. 1989), which held that an employer waived an objection to an award of back pay when back pay was a likely remedy. The district court noted that AEIF sought broader relief in Grievance No. 01-X-453 than was strictly provided for in the CBA, and that AK Steel did not distinguish between the apprentices who did and did not comply with the grievance procedures.

This case differs from *John Hofmeister* and *Marval Poultry*. This case does not involve a single individual,

or an award of back pay in a situation where grievants typically receive back pay. Rather, this is a case where the CBA set forth a specific grievance procedure and eighty-seven apprentices followed that procedure. AK Steel had no reason to believe, at the time of the hearing, that any one of the apprentices who did not follow the grievance procedure would receive a monetary award. AEIF asked the Arbitrator, at the hearing, to make the individual grievants/apprentices whole. Surely, "grievants" does not mean all apprentices, including those who never even filed a grievance, as such an interpretation essentially reads out of the CBA those provisions that govern grievance procedures.

There is no indication that either party intentionally sought or contemplated an arbitration award to all apprentices at the time of the hearing. Thus, at the time of the hearing, AK Steel was not on notice that AEIF sought monetary relief for all apprentices. The district court erred in holding that AK Steel should have foreseen that the Arbitrator would award relief to all apprentices, when all the apprentices did not comply with the grievance procedure required by the CBA. AK Steel should not be placed in a position of having to anticipate every possible argument or issue that might influence the Arbitrator's award, especially those issues that AK Steel did not know it needed to defend and those that conflict with the plain meaning of the CBA. *John Hofmeister*, 950 F.2d at 1344-45. Therefore, we hold that AK Steel did not waive its right to challenge an arbitration award to those apprentices who did not properly comply with the CBA's grievance procedures and that the Arbitrator exceeded his authority by awarding monetary relief to all apprentices.

Accordingly, we reverse the district court's grant of partial summary judgment in favor of AEIF.

#### IV. CONCLUSION

For all the foregoing reasons, we **REVERSE** the district court's grant of partial summary judgment in favor of AEIF and remand the case for further proceedings consistent with this opinion.

#### Footnote

n1 An additional 145 apprentices who attended training without paid transportation did not sign the grievance.

Case No. C-1-03-072

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

ARMCO Employees Independent Federation, Inc.  
Plaintiff

v.

AK Steel Corporation  
Defendant

Order Granting in Part and Denying in Part Plaintiffs  
Motion for Summary Judgment and Denying  
Defendant's Motion for Summary Judgment

District Judge Susan J. Dlott

This matter comes before the Court on Plaintiff's Motion for Summary Judgment (doc. #13) and the Motion of Defendant AK Steel Corporation for Summary Judgment (doc. #11). Plaintiff Armco Employees Independent Federation, Inc. ("AEIF") filed this action pursuant to the Labor Management Relations Act, 29 U.S.C. § 185, seeking enforcement of an arbitration award in favor of AEIF bargaining unit members. AEIF also seeks an award of attorney's fees. For the reasons that follow, the Court will enforce the arbitration award but will not award attorney's fees to AEIF. The Court **GRANTS IN PART** and **DENIES IN PART** the Plaintiff's motion and **DENIES** the Defendant's motion.

**I. BACKGROUND**

This dispute between AEIF and AK Steel management arose from AK Steel's unilateral decision, effective October 1, 2001, to terminate a paid transportation program for apprentices attending training classes at Sinclair Community College ("Sinclair") in Dayton, Ohio. For more than two years prior to October 2001, AK Steel had provided all apprentices transportation from its Middletown, Ohio facility to the training classes and had paid for their travel time. AK Steel discontinued these services as a cost-cutting measure. More than 300 apprentices were affected by the termination of the transportation program.

On or about October 1, 2001, a group of apprentices filed a grievance seeking reinstatement of the transportation service and paid travel time, as well as monetary damages. Grievance No. 01-X-453 stated in relevant part as follows:

*Name of Employee Apprentice Group*

|           |             |
|-----------|-------------|
| Check No. | Various     |
| Phone No. | Various     |
| Job       | Apprentices |

Statement of Grievance:

*The Grievances, bargaining unit members enrolled in the Apprenticeship Program and attending classes or will be attending apprentice-required classes at Sinclair Community College, contend that the Company violated the Collective Bargaining Agreement when it unilaterally decided and instructed Apprentices to report to Sinclair Community College*

via their own transportation and on their own time.

### Remedy Sought:

To have the Company return to the practice of providing safe transportation to and from the apprentice training at Sinclair Community College during work time *and to be made whole for time spent traveling to and from Sinclair Community College and to be made whole for incurred expenses such as but not limited to gas and parking fees.*

(Doc. #15, ex. 1, Grievance Report (emphasis added).)

The collective bargaining agreement ("CBA") between AK Steel and AEIF generally requires that grievances originate with and be signed by the employees involved. (Doc. #12, ex. 1, CBA Art. VII § E(5).)<sup>1</sup> An exception exists for the processing of group grievances. Group grievances must be signed by a union representative and at least one of the aggrieved parties. (*Id.*, CBA Art. VII § B(4)(b).) Additionally, group grievances require that "[t]he names (and check numbers) of all employees alleged to be aggrieved must be identified and submitted with the grievance at the time of the filing or appeal to Step II [of the grievance procedures]." (*Id.*)<sup>2</sup> Any deviations from the group grievance procedures "must be approved by Industrial Relations." (*Id.*, CBA Art. VII § B(4)(d).) Eighty-seven apprentices both signed Grievance No. 01-X-453 and provided their check numbers on the grievance ("the Group Grievants"), while another 86 apprentices signed the grievance without providing their check numbers. An additional number of apprentices who had attended

training without paid transportation did not sign the grievance.

AK Steel denied Grievance No. 01-X-453 on February 6, 2002, and AEIF instituted arbitration proceedings to appeal the denial. The parties participated in an arbitration hearing before Arbitrator Daniel L. Merritt, J.D., Ph.D. in August 2002. On October 17, 2002, Arbitrator Merritt issued an Opinion and Award sustaining the grievance. Arbitrator Merritt recognized in the Opinion and Award that Grievance No. 01-X-453 had been filed by "some of the apprentices." (Doc. # 15, ex. 6, Opinion and Award at p.13.) Nonetheless, he ordered AK Steel to reinstitute the paid transportation program and to "make whole all apprentices for travel time and out of pocket transportation expenses" incurred after the company's termination of the transportation program. (*Id.*, Opinion and Award at p. 24 (emphasis added)).

Following Arbitrator Merritt's award in favor of the apprentices, AK Steel reinstituted the transportation program for all apprentices, but AK Steel has paid damages to only the 87 Group Grievants who signed the grievance and provided their check numbers. AK Steel argues that only those 87 apprentices complied with the requirements for a group grievance pursuant to Article VII, section B(4)(b) of the CBA.

On January 28, 2003, AEIF filed this action against AK Steel requesting the Court to enforce Arbitrator Merritt's Opinion and Award. Specifically, AEIF requests the Court to order AK Steel to pay damages to all apprentices who attended training at Sinclair without paid transportation. AEIF also seeks an

award of attorney's fees. Both parties have now moved for summary judgment.

## II. STANDARD FOR REVIEW OF AN ARBITRATOR'S DECISION

When terms of a CBA call for grieving before an arbitrator, a district court's review of the arbitrator's decision is very narrow. The Sixth Circuit has called it "one of the narrowest standards of judicial review in all of American jurisprudence." Lattimer-Stevens Co. v. United Steelworkers of America, 913 F.2d 1166, 1169 (6th Cir.1990). The narrowness of the review reflects the strong statutory preference for private settlement of labor disputes without government intervention. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987). The Supreme Court has stated:

The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Id. at 37-38. Because of this narrow scope of review, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Id. at 38; see also Beacon Journal Publ. Co. v. Akron Newspaper Guild, Local No. 7, 114 F.3d 596, 599 (6<sup>th</sup> Cir.1997) (quoting same); Bruce Hardwood Floors v. Southern Council of Industr. Workers, 8 F.3d 1104, 1106 (6<sup>th</sup> Cir.1993) (quoting same). Courts may not reverse an arbitrator's decision simply because the arbitrator made a "serious legal or factual error." Beacon Journal Publ. Co., 114 F.3d at 599.

Nonetheless, this Court's review is not toothless. See id. An arbitration award "must draw its essence from the [collective bargaining agreement] and cannot simply reflect the arbitrator's own notions of industrial justice." Misco, 484 U.S. at 38. An arbitration award fails to draw its essence from the collective bargaining agreement when,

- (1) it conflicts with express terms of the agreement;
- (2) it imposes additional requirements not expressly provided for in the agreement;
- (3) it is not rationally supported by or derived from the agreement; or
- (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement.

Kuhlman Elec. Corp. v. International Union, 144 F.3d 898, 902 (6<sup>th</sup> Cir. 1998) (quotations and citations omitted). An arbitration decision will not be enforced "when that decision departs from any conceivable

interpretation-of the contract." Beacon Journal Publ. Co., 114 F.3d at 600. Therefore, an arbitrator may construe ambiguous contract language, but cannot ignore or modify unambiguous contract language. See International Bd. of Elec. Workers, Local No. 1842 v. Cincinnati Elec. Corp., 808 F.2d 1201, 1203 (6th Cir.1987).

The arbitrator's broad discretion extends to his or her choice of remedy. See AK Steel Corp. v. United Steelworkers of Am., 163 F.3d 403, 409 (6th Cir.1998). "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." Misco, 484 U.S. at 36. However, the arbitrator is roughly bound by the terms of the grievance submitted in formulating an award. See Johnston Boiler Co. v. Local Lode No. 893, 753 F.2d 40, 43 (6th Cir.1985). An award that clearly goes beyond the submission or is not based on precise terms of the collective bargaining agreement is unenforceable. See id.; see also Beacon Journal Publ. Co., 114 F.3d at 600.

### III. ANALYSIS

#### A. Enforcement Of The Opinion And Award

The issue before the Court is whether AK Steel has complied with Arbitrator Merritt's Opinion and Award. AEIF argues that AK Steel has not complied with the Opinion and Award because AK Steel has not made whole "all apprentices for travel time and out of pocket transportation expenses." (Doc. # 15, ex. 6, Opinion and Award at p. 24 (emphasis added)). AK

Steel contends that it has fully complied with Arbitrator Merritt's Opinion and Award because Arbitrator Merritt recognized that only some apprentices initiated the grievance, (*id.*, Opinion and Award at p.13 ("On 1 October 2001, some of the apprentices filed a grievance ..... )), and he must have intended to award damages only to the Group Grievants. AK Steel submits that Arbitrator Merritt had authority under the CBA to award damages only to employees identified by name and check number in the group grievance and that the Opinion and Award is enforceable only to that extent. (Doc. #12, ex. 1, CBA Art. VII § B(4)(b).)

AK Steel argues that Arbitrator Merritt exceeded his authority by awarding monetary damages to non-parties to the grievance. Arbitration awards may be vacated where an arbitrator has exceeded his powers. See 9 U.S.C. § 10(a)(4) ("In any of the following cases [a United States district court] may make an order vacating the [arbitration] award upon the application of any party to the arbitration- . . . (4) Where the arbitrators exceeded their powers. . . ."). The Sixth Circuit has held that an arbitrator exceeds his authority when he "determine[s] the rights or obligations of non-parties to the arbitration." Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 846 (6<sup>th</sup> Cir. 2003). Accordingly, the Sixth Circuit has vacated arbitration awards wherein the arbitrator awarded a remedy to persons not party to the arbitration proceeding. See id. at 847; NCR Corp. v. Sac-Co., Inc., 43 F.3d 1076, 1080 (6<sup>th</sup> Cir.1995).

AEIF does not refute AK Steel's interpretation of the group grievance provisions of the CBA or the

legal precedent that arbitrators cannot award relief to non-parties. Instead, AEIF contends that AK Steel waived this potential defense to noncompliance with the Opinion and Award by not arguing to Arbitrator Merritt that he had authority to issue a monetary award to the Group Grievants only. In fact, when AK Steel specifically identified the provisions of the CBA relevant to Grievance No. 01-X-453 during the arbitration proceedings, it did not identify the group grievance provisions of Article VII. (Doc. # 15, ex. 4 p. 6-7.).

As a general rule, arguments not presented to an arbitrator are deemed waived and cannot be raised for the first time in an enforcement action in the district court. See e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 846 (6<sup>th</sup> Cir. 2003) (stating that a party may waive objection to the jurisdiction of arbitrators); International Union, UAAAIWA v. Greyhound Lines, Inc., 701 F.2d 1181, 1189 (6<sup>th</sup> Cir. 1983) (stating that objections not raised at the arbitration hearing are waived). "It is well settled that a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse." See Marino v. Writers Guild of Am., East, Inc., 992 F.2d 1480, 1484 (9<sup>th</sup> Cir.1993) (holding that a party waived its objection to the fairness of arbitral procedures by not raising it at the arbitration). A party claiming waiver bears the burden of proof. See Nationwide, 330 F.3d at 846.

The duty to raise issues before the arbitrator includes a duty of an employer to raise objections to an

arbitrator's remedy. The policy of settling labor disputes through arbitration would be undermined if employers were permitted to withhold information from an arbitrator and then raise it as a defense to noncompliance with an arbitration award. See Chicago Newspaper Guild v. Field Enterprises, Inc., 747 F.2d 1153, 1157 (7<sup>th</sup> Cir. 1984). For example, in United Food & Comm. Workers v. John Hofmeister and Son, Inc., 950 F.2d 1340 (7<sup>th</sup> Cir. 1991), the Seventh Circuit held that an employer waived its objection to an arbitrator's award of back pay to a grievant in a wrongful discharge case. The arbitrator in John Hofmeister ordered the company to reinstate the discharged grievant and make him whole. See id. at 1342. After the arbitration, the company argued for the first time that the grievant was not entitled to back pay damages to be made whole because his injuries prevented him from working during the relevant period. See id. Though the court recognized that parties "cannot be expected to anticipate every defense or datum that might influence an arbitrator's award," the court instructed that parties "must provide the arbitrator with enough information so that he may [ ] reach an informed decision [and] craft a reasonable remedy." Id. at 1344-45. The court found that reinstatement and back pay were common awards in wrongful discharge cases, and therefore, the employer should have objected about the potential back pay award to the arbitrator. See id. at 1345; see also United Food & Comm. Workers v. Marval Poultry Co., Inc., 876 F.2d 346, 352 (4<sup>th</sup> Cir. 1989) (holding that an employer waived an objection to an award of back pay).

Parties to an arbitration can also waive specific

provisions of a CBA. For example, in Automobile Mechanics, Local 791 v. Holiday Oldsmobile, 356 F. Supp.1325, 1330 (N.D. Ill. 1972), the CBA required that an arbitration decision be rendered within 90 days of the established date of the complaint. In federal court, the defendant sought to have an award vacated because it was rendered more than one year after the date of the complaint. See id. The court held that the defendant waived his objection to the award because he did not assert the 90-day defense to the arbitrator and he participated in an arbitration hearing held more than 90 days after the date of the complaint. See id. The court held that the defendant could not "come at this late date and assert an objection that it quite obviously waived." Id.

Based on these precedents, AK Steel had an obligation to present to the arbitrator all foreseeable restrictions on his authority to fashion a reasonable remedy, including those based on the express terms of the CBA. AK Steel contends that it did not waive the group grievance defense because it was not foreseeable that Arbitrator Merritt would award damages to the non-Group Grievant apprentices. The issue, therefore, is whether Grievance No. 01-X-453, as presented to Arbitrator Merritt in writing and at the hearing, was broad enough that it was foreseeable that Arbitrator Merritt might award damages to all apprentices.

A review of the record in this case demonstrates that AEIF sought broader relief in Grievance No. 01-X-453 than was strictly provided in the group grievance procedures of the CBA. Almost half of the apprentices who signed the grievance failed to provide their check numbers as required by Article VII section B(4) of the

CBA. There is no evidence that either side acknowledged this discrepancy or distinguished between the groups of signatories during the arbitration process. Additionally, the language by which the grievants were identified on the face of the grievance-"Grievants, bargaining unit members enrolled in the Apprenticeship Program and attending classes or will *be* attending apprentice-required classes at Sinclair Community College"-was not restricted to those apprentices who signed Grievance No. 01-X-453. (Doc. #15, ex. 1 (emphasis added).) Rather, the grievance was filed on behalf of current and future apprentices adversely affected by the cessation of paid transportation to training classes.

In response, AK Steel points to AEIF's opening statement at the arbitration hearing wherein AEIF arguably requests monetary relief for only the Group Grievants and not all apprentices:

As a remedy, the Union is requesting an order that the Company reinstate the Company-provided transportation and reinstate the practice of paying for the travel time itself. In addition, the Union *requests that the individual grievants/apprentices be made whole* for out-of-pocket transportation expenses incurred during the period of time that this practice was unilaterally ceased by the Company, and we would ask the Arbitrator to retain jurisdiction ... [to enable the parties to] determine the appropriate measure of reimbursement due the *individual grievants*.

(Doc. # 15, ex. 3, Transcript p.13 (emphasis added).)

AK Steel argues that the use of the phrase "individual grievants/apprentices" and "individual grievants" meant that the Union was seeking monetary relief only for the Group Grievants.

The Court finds the AEIF's use of these phrases to be ambiguous. Arbitrator Merritt could have understood AEIF's focus on "individual" grievants as to damages to imply only that the appropriate measure of damages for each apprentice had to be determined on an individual basis. Each apprentice would have incurred a different amount of out-of-pocket expenses based on the number of classes they attended without paid transportation. In fact, earlier in its opening statement, AEIF had referred to the fact that "individual apprentices incurred transportation expenses, parking, gas." (*Id.*, Transcript p. 11.) Later in the hearing, AEIF introduced into evidence a list of all apprentices then attending the training at Sinclair. (*Id.*, Transcript p. 25.) AEIF's arguments at the arbitration hearing, taken as a whole, did not distinguish between the Group Grievants and the other apprentices affected by the termination of the training program.

Additionally, in its post-hearing brief, AEIF expressly sought monetary relief for all apprentices:

For these reasons, [AEIF] respectfully requests that the Arbitrator:

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2. order the Company to reinstate Company-provided and paid transportation for apprentices, and to reinstate the practice of compensating apprentices for travel time;

3. order the Company *to make whole all apprentices* for travel time and out-of-pocket transportation expenses.....

(Doc. #15, ex. 5 at p.12 (emphasis added).)

The Court concludes that it was foreseeable, based on the terms of the written grievance and the specific arguments presented by AEIF during the arbitration proceeding, that Arbitrator Merritt might award monetary relief to all apprentices if he sustained Grievance No. 01-X-453. AK Steel failed to raise the issue of compliance with the CBA group grievance procedures to Arbitrator Merritt. AK Steel cannot attack collaterally Arbitrator Merritt's Opinion and Award before this Court on grounds not presented to Arbitrator Merritt. Accordingly, the Court **DENIES** summary judgment to AK Steel and **GRANTS IN PART** summary judgment to AEIF to the extent that AK Steel must pay damages to all apprentices affected by the termination of the transportation program.

#### **B. Attorney's Fees**

In addition to seeking enforcement of Arbitrator Merritt's Opinion and Award, AEIF also seeks an award of attorney fees based on AK Steel's alleged bad faith in failing to pay damages to all apprentices. Attorney's fees can be assessed against a party acting in bad faith in an LMRA action. The Sixth Circuit has defined three categories of bad faith for which attorney's fees can be assessed:

- 1) bad faith occurring during the course of the litigation;

- 2) bad faith in bringing an action or in causing an action to be brought; and
- 3) bad faith in the acts giving rise to the substantive claim.

Aircraft Braking SSys. Corp. v. Local 586, UAW, 97 F.3d 155,163 (6<sup>th</sup> Cir.1996). AEIF submits that AK Steel acted in bad faith by failing to comply fully with the Opinion and Award.

AK Steel paid damages to Group Grievants only based on its interpretation of the Opinion and Award in light of the group grievance provisions in the CBA. AK Steel's interpretation of the Opinion and Award was not so unreasonable as to amount to bad faith. Moreover, the Court does not find an abusive pattern by AK Steel to refuse to comply with arbitration decisions absent enforcement orders by the district court. The previous and pending cases in the Southern District of Ohio appear at this time to be factually distinguishable from each other. Each must be assessed on its own merits. Accordingly, the Court **DENIES** summary judgment to AEIF to the extent that it will not award attorney's fees.

#### IV. CONCLUSION

For the foregoing reasons, the Motion of Defendant AK Steel Corporation for Summary Judgment (doc. #11) is **DENIED** and Plaintiff AEIF's Motion for Summary Judgment (doc. # 13) is **GRANTED IN PART** and **DENIED IN PART**. The Court **ORDERS** that AK Steel "make whole all apprentices for travel time and out of pocket transportation expenses, including but not limited to mileage, gas and parking

expenses incurred after the 1 October 2001 termination of the Company provided and paid transportation."

IT IS SO ORDERED.

s/Susan J. Dlott Susan J. Dlott  
United States District Judge

Footnotes

<sup>1</sup> Article VII § E(5) of the CBA states as follows:

It is understood and agreed that no request or complaint which is not originated by the employee or employees involved, and no grievance which is not originated and signed by the employee or employees involved may be processed through any step of the grievance procedure except as outlined in Article VII, Section B, Paragraph 4.

(Doc. #12, ex. 1, CBA Art. VII § E(5))

<sup>2</sup> Article VII, section B(4) states in relevant part:

4. Grievances of a general nature or group grievances may be processed subject to the following:

a. Disputes of a general nature requiring broad interpretation and application of this agreement may be submitted by the AEIF Executive Committee directly in Step II of the grievance procedure. It is understood that the remedy sought will

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be limited to interpretation resolution of the issue.

b. Group grievances must be signed by the appropriate Trustee, Delegate(s), Grievancemen and at least one of the aggrieved parties. The names (and check numbers) of all employees alleged to be aggrieved must be identified and submitted with the grievance at the time of the filing or appeal to Step II.

(Doc. #12, ex. 1, CBA Art. VII § B(4).)

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No. 04-4110

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

ARMCO EMPLOYEES INDEPENDENT  
FEDERATION, INC.,  
Plaintiff-Appellee,

v.

AK STEEL CORPORATION,  
Defendant-Appellant

11/22/2005, Filed

**JUDGES:** Before: BATCHELDER, GIBBONS and  
McKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the origin! panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT  
Leonard Green, Clerk

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OPINION AND AWARD OF ARBITRATION

AAA No. 523000038202

Opinion and Award of  
Arbitrator

Daniel L. Merritt Esq.

17 October 2002

In the Matter of Arbitration between AK Steel  
Corporation, The Employer

-and-

ARMCO Employees Independent Federation, Inc. The  
Union

Re: Grievance 01-X-453 Apprentice Group, Grievants

BACKGROUND

Pursuant to ARTICLE VII GRIEVANCE PROCEDURE of the applicable Collective Bargaining Agreement between AK Steel Corporation (herein called either "Company" or "Employer") and ARMCO Employees Independent Federation, Inc.(herein called the Union) the undersigned was mutually selected to serve as the neutral Arbitrator to hear evidence and render a decision in the matter of the Apprentice's grievance. An evidentiary hearing was held on Wednesday, 7 August 2002 in room three of the Training Building at AK Steel Corporation, 1801 Crawford Street Middletown, Ohio. During the course of the hearing all of the parties were provided with a full and complete opportunity to be heard, present relevant evidence, cross examine witnesses and present their respective positions. An official transcript of the hearing was made by Irene D. Donner. RPR, RMR. Registered Professional Reporter and Notary Public of

the reporting firm Donner Reporting. All witnesses appearing before the Arbitrator were duly sworn. Closing arguments were reserved to Post Hearing Briefs, which were exchanged on 27 September 2002. The hearing stood closed as of that date. The Post Hearing Briefs were received by the Arbitrator on 31 September 2002.

James Robinson one of the Apprentices represented the class of Grievants in this case. He attended the entire hearing and testified.

#### APPEARANCES BY COUNSEL

Attorney for AK Steel Corporation  
 Gregory Parker Roger Esq. Taft, Stettinius &  
 Hollister, LLP  
 1800 Star Bank Center  
 425 Walnut Street Cincinnati, Ohio 45202-3957

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Attorney for AEIF, Inc.  
 Robert H. Mitchell Esq.  
 Manley, Burke & Lipton  
 225 West Court Street Cincinnati, Ohio 45202

Present on behalf of AEIF, Inc.  
 Ed Shelly, President of AEIF, Inc.  
 James Robinson, Trustee of AEIF, Inc.  
 Ed DeVault Trustee of AEIF, Inc.

#### ISSUES AND PROCEDURAL CONSIDERATIONS

During the course of the hearing the parties framed the specific issue to be addressed and determined in the arbitral proceedings as follows:

Did the Company violate the, Contract and or past practice by unilaterally discontinuing the provision of transportation and pay for transportation time to apprentices required to attend apprenticeship training at an off site location in Dayton Ohio? If so what remedy shall be provided?

## APPLICABLE CONTRACTUAL PROVISIONS

### ARTICLE V: MANAGEMENT

#### Section A

1. The management of the business and the direction of its working forces, including the right to... change assignments... [and] to establish work schedules and to make changes therein essential to the efficient operation of the plant,...are the exclusive rights of the Company; provided however that in the exercise of such rights the Company shall observe the provisions of this Agreement.

### ARTICLE VII: GRIEVANCE PROCEDURE Section F - Arbitration

2. The impartial arbitrator shall render his award in writing within 30 calendar days from the date on which the grievance is heard by him. His decision shall be final and binding upon each of the parties hereto. The arbitrator shall have jurisdiction and authority to interpret and apply the provisions of this Agreement only insofar as necessary to the determination of such grievance, but he shall not have jurisdiction or authority in any way to change the provisions of this Agreement by alterations, additions to, or subtractions

form the terms thereof.

## ARTICLE X APPRENTICESHIP

### Section A- Program

In order that an adequate supply of competent, skilled journeymen shall be available, it is agreed that an Apprenticeship Training program shall be maintained by the Company.

### Section B - Selection

Apprentices shall be selection through the written application procedure as provided in Article VIII, Section G, paragraph 3g (Intersectional Transfer Step 3) of this Agreement, except an employee may file such application for an apprenticeship which is in his regular seniority section. The Company shall inform each employee selected for apprenticeship of the terms and conditions of his apprenticeship and such terms and conditions shall not be subject to change unless agreed to by the Union or unless conditions change substantially enough to require a modification in the apprenticeship program.

### Section C- Periods and Pay

1. The periods of apprenticeship and the scales of compensation of apprenticeship shall be published on the standard force reports to which they apply.
2. Individuals entering apprenticeships shall ordinarily be placed on the starting rate of the applicable scale. The Company may, however:

a. Allow credit not to exceed two years toward apprenticeship for the past Company experience in connection with the trade being entered, in which event the starting rate shall be determined in accordance with such credit and the individual advanced upon satisfactory completion of such succeeding scale period of training.

b. Transfer employees to apprenticeships at higher than the applicable starting rate when deemed by the Company to be warranted in individual cases, in which event the individual shall continue to receive the rate at which transferred until his accumulated period of apprenticeship shall entitle him to a higher rate under the applicable apprentice scale.

#### Section D - Completion of Apprenticeship

Upon completion of the apprenticeship training an individual retained in his trade craft by the Company shall be advanced to starting journeyman rate.

#### Section E - Seniority

1. An employee who enters an apprenticeship shall become a member of the seniority section upon the date of transfer to the section, but shall not accumulate any rights to the journeyman job block during the apprenticeship period. Upon successful completion of the apprenticeship and retention in the section, the employee shall be promoted to the appropriate journeyman classification. Such graduate assigned apprentice shall not contest the seniority of an employee who entered the starting journeyman classification and who advanced to a higher

classification during the period of apprenticeship of such graduate, but if the graduate is later promoted level-handled with an employee so advanced around him, such graduate will then pick up his full seniority rights in case of further promotion or cutback.

2. In the case of a cutback causing a temporary suspension of an employee's apprenticeship, such employee may hold or claim any job to which his seniority would entitle him under the seniority practices in effect in his seniority section.

3. An employee removed from apprenticeship because of failure to meet apprenticeship standards shall not be entitled to exercise a job claim in his apprenticeship seniority section. His entitlement to any other job in such seniority section shall be determined in accordance with the procedure described in Article VII, Section G-3.

4. An apprentice required to work in more than one section as a part of his training shall not lose seniority in the section to which originally assigned as an apprentice, but shall be considered as having been loaned from his original section unless a transfer is effected.

#### Section F – Apprenticeship Committee

A committee composed of 3 representatives designated by the Union and 3 representatives designated by Management shall be established for the purpose of reviewing apprenticeship problems, and such committee may make recommendations with respect to the apprenticeship program. This committee shall meet

at least once each month unless otherwise agreed to by the parties.

## ARTICLE XXIV MISCELLANEOUS PROVISIONS

### Section A - Maintenance Qualification and Classification

The Plan for Maintenance Qualification and Classification, as agreed to between the parties and dated December, 1957, with revisions dated January 28, 1970, and August 1, 1971, shall be continued for the duration of this Agreement.

### Section C Bargaining

For the duration of this Agreement neither party shall be obligated to bargain collectively, except as specifically provided by the Agreement, with respect to any subject or matter either covered or not covered by this agreement.

## ARTICLE XXV PRIOR AGREEMENTS

### Section A - Replacement of Prior Agreements

This Agreement, for the production and maintenance employees covered hereby, terminates and replaces the prior Agreement applicable to such employees.

February 4, 1995

Mr. Ed Shelley, President  
Armco Employees Independent Federation, Inc.  
1100 Crawford Street  
Middletown, Ohio 45044

Re: Maintenance Qualification Plan

Dear Mr. Shelley:

This is to confirm that during the 1994/1995 negotiations the parties discussed the mutual desire to revise the Maintenance Qualification Plan. To that end, a committee will be established consisting of six (6) representatives, comprised of three (3) from AEIF and three (3) from the company.

The committee will meet within 90 days of (the ratification date of the agreement) and monthly thereafter as necessary to revise the Plan.

Very truly yours,  
s/Dale E. Gerber  
Manager - Industrial Relations

Confirmed:  
/s/Ed Shelley, President- The AEIF, Inc.

#### FACTUAL SUMMARY

AK Steel Corporation is engaged in the production of steel at the plant in Middletown, Ohio. The Company's production and maintenance personnel are represented in collective bargaining by the ARMCO Employees Independent Federation, Inc. The Union and the Company have reached agreement on successive contracts. The current Collective Bargaining Agreement was signed on 1 November 1999 and is dated March 1999.

An apprenticeship program was instituted at the

Middletown Works in the 1950's (See Jt. Ex 4) and under ARTICLE X of the current contract the Company agreed to maintain an Apprenticeship Program to insure "that an adequate supply of competent skilled journeyman shall be available." (See Jt. Ex. 1, ARTICLE X, Sec A at 93). Prior to 1999 apprenticeship training was always provided in-house at Middletown Works. Apprentice attended class from 8:00AM to 5:00PM and had an unpaid lunch hour. The Company changed the time to 8:00AM to 4:00PM and eliminated the lunch hour. Apprentices were fed while receiving training and were still paid for an (8) hour day.

In January 1999 the Union was informed by the Company that Apprenticeship Training was being relocated from Middletown Works to a Community College in Dayton, Ohio, which is north of Middletown, Ohio. The Company also informed the Union that apprentices would have to clock in at Middletown Works at 7:00 AM travel in a Company paid bus to the Community College for training and return on the Company paid bus to Middletown to clock out at 3:00 PM. The apprentice would be paid for an eight hour day. These changes were not negotiated with the Union. No grievances were filed by the Union regarding these changes. The apprentices were paid for a full eight hour day.

For the first two quarters of 2001 the Apprenticeship Training Program was suspended because of alleged economic problems. On September 2001 the Company informed the Union that beginning 1 October 2001 Apprentices would have to provide their own transportation to the Community College and that the

training would be conducted from 7:00AM to 3:00PM exclusive of transportation time. Apprentices also would not receive pay for travel time or travel expenses. They have not received such pay since 1 October 2001.

On 1 October 2001 some of the apprentices filed a grievance against the unilateral elimination of paid transportation and time to the Community College. On 9 January 2002 the Company denied the grievance. The Company took the position that no agreement obligated the Company to provide paid transportation to and from the site of Apprenticeship Training. Thus the factual basis was formed for the instant arbitral proceeding.

#### EMPLOYER'S POSITION

The contract did not limit the power of the Company to cease providing paid transportation to the Community College and requiring the apprentices to provide their own transportation to the training site. The contract is unambiguous therefore "past practice" should not be considered. The Union in any event did not show that the busing system agreed upon and accepted by mutual consent of both parties.

AK Steel Corporation has a history of making changes in the Apprenticeship Training Program unilaterally. Arbitrators Stone and Sergeant viewed the contract as a limitation on the power and authority of the Employer. Therefore the Union had to show that the contract prohibited the Employer from taking the management action they took. (See AK Steel Corp., Case No. 52 300 00221 95 (Stone 1996); Castle Rubber Co., 94-1 CC Harb

Sec. 4072 (Sergent 1993)). The contract does not prohibit AK Steel Corporation from eliminating the busing and telling apprentices to provide their own transportation to the training site.

The contract states that "an Apprenticeship Training Program shall be maintained by the Company." (See Jt. Ex. 1 ARTICLE X Sec. A). The Contract is silent regarding implementation of the Apprenticeship Training Program. The Company's decision to end the busing program was not prohibited by the contract nor inconsistent with the provisions of the contract. The Company's decision was based upon economic conditions and will help the Company remain competitive in the steel market.

There was no past practice of providing transportation to training sites and no past practice of funding for travel time to a training site. The terms of the contract are unambiguous thus the concept of past practice is inappropriate. The "intent of the parties as exposed in their collective bargaining stands inviolate" (See Warner Cable of Akron, 91 LA 48, 51 (B: Hel, 1988).

The Company's decision to bus the Apprentices to the training site and to fund the busing and travel time was not a binding past practice. "The assumption is that there is no past practice, thus the party asserting it must bear the burden of proof" (See Globe Ticket & Label Co., 105 LA 62, 66 (McCurdy, 1995) (See also Celanese Corp. of Am., 24 LA 168, 172 (Justin, 1954).

The Company's decision to provide transportation to the Apprentice Training Program site for two and one half years does not make it a binding past practice. The

parties did not mutually agree to the busing nor was the busing mutually accepted.

Arbitrator Strasshofer in Country Lane Foods, Ins. 88 LA 599 (Strasshofer 1986) denied the Union grievance, which challenged the Company's unilateral change in relief breaks. He stated that the "Union was not able to establish by weight of the evidence that the prior practice concerning relief breaks was a binding practice...without objection from the Union the scheduling of the relief breaks had been a Management decision and that at no time was the matter negotiated ...with the Union." (Id at 602)

The Arbitrator in American Red Cross, 106 LA 224 (Grooms, 1996) denied a grievance regarding past practice and travel policy. He stated..."a past practice may result from an agreement or understanding between the parties there is no evidence in this case that the old travel policy was the result of a joint agreement....This practice was an exercise of management discretion with no thought of future obligation. (Id at 229).

The parties herein did not mutually agree to the busing system. It was a unilateral decision made by the Company to make the training more efficient. The decision to end the apprentice busing and have the apprentice trainees drive to the training site was also a unilateral Company decision to cut costs in an adverse economic climate. The busing system was not a mutually agreed upon decision nor was it a mutually accepted decision.

The only past practice is that the Company unilaterally

made decisions that charged the Apprenticeship Training Program. The Company changed the hours of the training and eliminated the lunch hour. These changes were not negotiated with the Union. In March 1999 The Company made the unilateral decision to move the training to a Community College in Dayton, Ohio. The Company provided transportation to and from the site. None of these changes were negotiated with the Union. The Union failed to file a grievance regarding these decisions. Later the Company because of economic concerns eliminated the busing system and instructed apprentices to report directly to the Community College for training. The Company has such discretion to implement the training program. For the above stated reasons the Company asked that the Union grievance be denied. No past practice was established nor was the contract violated.

### UNION POSITION

It has long been held that labor agreements are more than the written contracts. Also included are understandings; written and oral interpretations and mutually accepted customs and practices. The Supreme court stated: "The labor arbitrator's source of law is not confined to the express provisions of the contract...the practice of the industry and the shop is equally a part of the collective bargaining agreement although not expressed in it." (See *Steelworkers v Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-2(1960). Arbitrators recognize that custom and past practice may under appropriate circumstances be recognized as a part of the parties agreement. (See *Esso Standard Oil Co.*, 16 LA 73 (McCoy 1951); *Phillips Petroleum Co.*, 24 LA 191 (1955); *Kobelco Stewart Bolling, Inc.*, 108 LA 1093

(Curry 1997)). Without a written agreement "past practice may be binding on both parties if the practice is "1. unequivocal (2.) clearly communicated and acted upon (3.) readily ascertainable over a reasonable period of time as a final and established practice accepted by both parties." (See Celanese Corp. of America, 24 LA 168, 172 (Justin 1954)).

The record is clear that from January 1999 until 1 October 2001 the Company provided paid transportation for apprentices to the training site and back to Middletown Works. The apprentices were compensated for their travel time. The process was clearly enunciated and practiced. The record is also clear that this practice continued for two and one half years and was accepted by the Company and the Union.

Two years of practice is enough of a reasonable time period to establish a binding past practice. (See Weston Paper and Manufacturer Co., 76 LA1273 (Bowles, 1981)). The practice in this case was acceptable by both parties and the fact that one party may have instituted the practice is not controlling. (See Sterling Furniture Mfrs., 46 LA 705 (Hanlon 1966); Union Asbestor & Rubber Co., 39 LA 72 (Volz 1962)). Most past practices cases begin with unilateral Employer action. (See Elkouri & Elkouri, How Arbitration Works. 633, 5th Ed. (BNA 1977). Implied mutuality may be inferred from the uncontested continuation of the practice. (See Dixie Machine Welding & Metal Works., 88 LA 734 (Baroni 1987); U.S. Industrial Chemical Co., 76 LA 620 (Levy 1981). The apprentices were fully compensated by the Company so the Union asserted to the change and did not challenge or grieve the busing system. The Union did not attempt to restrict any management rights to

support a past practice rather the Union is supporting the enforcement of a past practice, which benefited Union apprentices. The Union did not challenge the change of training site but wants enforcement of the past practice of compensating apprentices for time and personal expenses incurred in order to attend the off site training.

The past practice at issue herein provides more than mere gratuities. Classroom training in the Apprenticeship Program is mandatory and expenses relating to travel time and transportation to an off site training location is much more than a gratuity.

ARTICLE XXIV contains no restrictions on past practice that one might find in some zipper clauses. Negotiations in 1999 continued this ARTICLE without any changes.

There are no express provisions regarding the Company's imposition of uncompensated time and out of pocket expenses on apprentices who are attending mandatory classroom training at an off site location. Thus there is no conflict with express provisions of the contract. In addition ARTICLE X (B) states that "The Company shall inform each employee selected for apprenticeship of the terms and conditions of his apprenticeship and such terms and conditions shall not be subject to change unless agreed to by the Union or unless conditions change substantially enough to require modification in the apprenticeship program." There was no agreement to the unilateral termination of Company paid transportation and travel compensation. Mere "economic concerns" do not equal "changed circumstance" in support of unilateral

termination of a past practice. (See Western Paper and Manufacturer Co., 76 LA 1273 (Bowles 1981).

### OPINION AND CONCLUSIONS

The issue in this case is clear and involves the question of whether the practices followed by the Company and Union in the Apprenticeship Training Program for two and one half years constituted a binding practice that is; a "past practice." ARTICLE X Section A states that "In order that an adequate supply of competent, skilled journeymen shall be available it is agreed that an Apprenticeship Training Program shall be maintained by the Company. While there is no direct reference to the actual implementation of the program in ARTICLE X, Section B does make reference to the terms and conditions after language about selection. The Section B language states that "The Company shall inform each employee selected for apprenticeship of the terms and conditions of his apprenticeship and such terms and conditions shall not be subject to change unless agreed to by the Union or unless conditions change substantially enough to require a modification in the apprenticeship program." Both parties rely on the meager language to offer a rationale as to why they are correct. The Company asserted that the language is unambiguous regarding implementation. The contract in the view of this Arbitrator is rather silent and ambiguous regarding actual implementation.

The history of the Apprenticeship Training Program is one that follows most national program trends. The training was offered at the plant site since the 1950's. Typically the apprentice attended classroom training from 8:00 AM to

5:00 PM and had an unpaid lunch hour. Later the hours were changed to 8:00 AM to 4:00 PM and the apprentices were provided a paid lunchtime within the eight hours. Under both plans the apprentices received pay for eight hours.

On or about January 1999 the Company informed the Union that the Apprenticeship Training Program was being moved off site to a Community College in Dayton Ohio. Apprentices would be required (since the apprenticeship program was mandatory) to clock in at 7:00AM at the Middletown Works; ride a Company provided and paid for bus to the training off site. The apprentices would return by 3:00 PM and clock out at the Middletown Works. The total eight hour day consisted of paid travel time and transportation to the site away from and return to Middletown Works in addition to the training at the off site location.

On 1 November 1999 the parties signed a new labor agreement and the Apprenticeship Program and the related Qualification and Classification Plan were not raised in negotiations. On 24 September 2001 the Company notified all apprentices that beginning 1 October 2001 they would be responsible for their own transportation and travel time. They were expected to be at the Dayton, Ohio site at 7:00 AM and finish at 3:00 PM.

The parties have both cited Arbitrator Justin's statements regarding past practice: "In the absence of a written agreement 'past practice', to be binding on both parties must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a final and established

practice accepted by both parties.

The practice as outlined to the Apprentices and implemented in January 1999 was precise, clear and unequivocal. It was clearly enunciated to the apprentices and acted upon from January 1999 until 1 October 2001. The practice was accepted directly by the Company, which enunciated and implemented this precise and efficient off site plan. The Union did not file any grievance regarding the plan according to Union President Ed Shelley. The Union had considered such a move but after review of the plan they decided not to file any grievance because the Apprentices were paid in full for their workday. The Union accepted the plan and no grievance was filed. The program continued for two and one half years which the Arbitrator deems a reasonable period of time to establish a fixed practice for off site training of apprentices. The instant Arbitrator has had experience with training programs run on site at plant locations and those conducted off site. The off site locations expenses were paid for by the institutions and Companies which instituted the training program.

The analysis of the practice also includes additional factors. (1) The frequency of the practice instituted was such that both parties had knowledge of the practice since it was widespread. It included all Apprentices and had the assent of both parties; The Company who initiated the program and the Union who could have objected through the grievance process but did not. (2) The program was consistent and for two and one half years the scope included all apprentices. (3) The longevity of the program practice spanned two and one half years and over two contracts. (4) The off site

nature of the training created circumstances which necessitated a need for the transportation of apprentices. If the training remained on site the present issue would not have arisen. (5) The practice was not discussed in contract negotiations; the practice was expected to continue.

Finally the past practice issue pressed by the Union involves the working conditions of the employees. This is not gratuity rather it is a benefit that resulted in wages for travel time and income that was taxed.

The totality of factors support the conclusion that the Company and Union engaged in a binding practice over the two and one half years of existence. The Arbitrator deems the practice a "past practice" which the Company violated by the unilateral termination on 10 October 2001 and the concomitant shift of transportation time and expenses to individual apprentices while maintaining a required and mandatory off site training location. The grievance should be sustained.

### AWARD

Based upon the evidence as presented it is the AWARD of this Arbitrator that.

1. The Company violated the contract and past practices.
2. Grievance No. 01-X-453 is sustained
3. The Company shall provide compensation for transportation to apprentices to and from the training site location or shall provide Company paid

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transportation to and from the offsite training location

4. The Company shall provide compensation for travel time to apprentices to and from the offsite training location.

5. The Company shall make whole all apprentices for travel time and out of pocket transportation expenses, including but not limited to mileage, gas and parking expenses incurred after the 1 October 2001 termination of the Company provided and paid transportation.

Respectfully submitted  
s/Daniel L. Merritt, Esq.

Neutral Arbitrator  
Sylvania, Ohio  
17 October 2002

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AGREEMENT

Between

AK STEEL CORPORATION

And The

ARMCO EMPLOYEES

INDEPENDENT FEDERATION, INC.

(AEIF)

Middletown, Ohio

November 1, 1999

## **ARTICLE VII GRIEVANCE PROCEDURE**

### **Section A - Purpose and Scope**

1. The procedures set forth herein are established in order to promote harmonious relations between the employees and the Company through the prompt and fair discussion, consideration, and disposition of any request or complaint and shall constitute the sole recourse with respect to any claim by an employee of a violation of this Agreement by the Company.

### **Section B - Definition of Grievance**

1. A grievance, within the meaning of the grievance procedure, is restricted to a request or complaint not resolved as the result of the oral discussions required in Step I or a request or complaint appropriate for filing directly in Step II. It shall consist only of disputes about wages, hours of work, and working conditions, as provided in this Agreement; about the interpretation and application of this Agreement; and about an alleged violation of this Agreement. If any question arises as to whether said dispute is or is not a proper grievance within the meaning of these provisions, the question may be reserved throughout the grievance procedure and determined, if necessary, by the arbitrator.

2. Should any request, complaint, or grievance arise between the Company and any of its employees covered by this Agreement, there shall be no stoppage

of work and an earnest effort shall be made to resolve such difference [28] promptly through the procedures herein established.

3. It is understood and agreed that requests or complaints are to be presented in Step I or directly in Step II as follows:

a. Step I - These issues typically allege department supplement violation, or a violation of the basic agreement including seniority, progression charts, overtime, preference claims, Step II transfers, etc.

b. Step II - Grievances that are to be filed directly in Step II include the following categories, but, additional categories may be permitted to be filed in Step II by the mutual agreement of the parties or as specifically identified in the basic agreement. These categories are as follows;

Discipline involving time-off, discharges, Insurance Benefit issues, pensions, rates, incentives, grievance procedures, civil rights, safety, and contracting out.

4. Grievances of a general nature or group grievances may be processed subject to the following:

a. Disputes of a general nature requiring broad interpretation and application of this agreement may be submitted by the AEIF Executive Committee directly in Step II of the grievance procedure. It is understood that the remedy sought will be limited to interpretation resolution of the issue.

[29] b. Group grievances must be signed by the appropriate Trustee, Delegate(s), Grievancemen and at least one of the aggrieved parties. The names (and check numbers) of all employees alleged to be aggrieved must be identified and submitted with the grievance at the time of the filing or appeal to Step II.

c. Rate and/or Incentive grievances must be signed by an employee job dated or working the job being grieved, the department Delegate/Grievancemen, Rate and Incentive Committee Chairman and the appropriate member of the Executive Committee.

If an employee working or job dated to the job being grieved fails to sign the grievance, the remedy may not include retroactive pay.

d. Any deviation from the above guidelines involving group grievances or any other group grievance must be approved by Industrial Relations.

5. In all cases the time limits refer to calendar days in Article VII.

### **Section C - Adjustment of Requests Complaints, and Grievances**

1. It is the intent of this procedure that oral discussions be conducted on all requests or complaints. The use of oral discussions provided for in this procedure should result in a complete disclosure of the facts, written documentation of the discussions and a fair and prompt resolution of the majority of the requests or complaints that may arise. The parties' expectations to reach a mutual goal of expedient prob-

lem solving in a peaceful and orderly manner will only be reached by explicit dedication to the procedure.

2. A request or complaint, in order to be considered under this procedure, must be expressed in writing on a form provided by Management, and presented orally for initial discussion to the appropriate Management representative in an attempt to resolve the issue.

3. It is understood and agreed that if any difference shall arise between the Company and any employee as to the benefits payable pursuant to the Supplemental Unemployment Benefit Plan or the Insurance Agreement (including the Insurance Benefits Plan, but excluding life insurance) and such difference is not settled by discussion, the affected employee may file a grievance in Step II and process the grievance through the grievance procedure, including arbitration, as set out in this Article VII.

#### **Section D - Step I - Department Level**

A request or complaint, in order to be considered under this procedure, must be expressed in writing, on a form provided by the Company without a grievance number assigned. It is to be presented orally for initial discussion to the appropriate designated Management representative in an attempt to resolve the issue. The request for the discussion must be made within 30 calendar days after the date of the inception or occurrence of the event [31] upon which the request or complaint is based; such discussion must be held promptly. Otherwise, the

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request or complaint shall not be entitled to consideration. The Step I hearing is to be conducted within 15 days of the request for hearing and answered within 7 days of the hearing.

Should the issue not be resolved during the Step I hearing, the parties shall develop the grievance record. The record shall include the written statement of the grievance, the agreed upon facts and appropriate documentation. The grievance record shall be attached to the grievance form and copies provided as necessary.

Grievances not resolved at the Step I hearing must be appealed to the Step II level within 15 days of the receipt of the Step I response.

The designated Management representative shall have the authority to settle the request or complaint and, following the discussion, shall render his decision within seven days. The grievanceman and/or delegate shall have the authority to settle, withdraw, or refer the request or complaint to Step II.

Grievance resolution at the Step I level is made on a non-precedent setting basis.

#### Section E - Step II - Plant Level

Grievances for Step II hearing are those properly appealed from Step I hearing or those issues that are to be filed directly in Step II. Grievances filed directly in Step II must be filed within 30 days of the inception or occurrence of the [32] event upon which the request or complaint is based.

1. A request or complaint with respect to discipline involving time-off or discharge may be filed as a grievance in Step II subject to the provisions of Article IX, Discharge and Disciplinary Suspensions.

2. A request or complaint with respect to any specialty area of the Agreement, which area by its nature could be considered to involve more management responsibility than ordinarily assigned to the employee's departmental supervision, may, by agreement between the respective Step II representatives, be filed as a grievance in Step II, subject to the time limits set out above or in Article XI, Rates of Pay. Grievances which fall in this exception may include, but are not limited to, such topics as rate establishment or change, incentive establishment or change, and general plant rules.

3. It is understood and agreed that if any difference shall arise between the Company and any employee as to the benefits payable pursuant to the Supplemental Unemployment Benefit Plan or the Insurance Agreement (including the Insurance Benefits Plan, but excluding life insurance) and such difference is not settled by discussion, the affected employee may file a grievance in Step II and process the grievance through the grievance procedure, including arbitration, as set out in this Article VII.

4. It is understood and agreed that in the event appeals are not made to the next higher Step in the grievance procedure within the time limitations specified, except where formal written extensions have been agreed to, the request, complaint or grievance shall be considered to be settled and no further action

may be taken on it.

5. It is understood and agreed that no request or complaint which is not originated by the employee or employees involved, and no grievance which is not originated and signed by the employee or employees involved may be processed through any step of the grievance procedure except as outlined in Article VII, Section B, Paragraph 4.

6. Grievances answered at the Step II level shall establish a precedent except as otherwise agreed.

A grievance shall not be heard in a Step II meeting in the event the grievance record has not been sufficiently developed. In such a case, the grievance shall be referred back to the appropriate Company and Union representatives for further consideration and development of the facts. A Step II meeting will be scheduled and the grievance heard within 45 days of presentation to the Plant Management Representative. The Company and Union will schedule up to 14 Step II hearings weekly unless the parties agree otherwise. If the grievance is not scheduled and heard within 45 days, the grievance will be considered granted on a non-precedent basis. Should the level of grievances exceed 100 pending a Step II hearing, such guarantee, including the penalty, shall not apply.

[34]However, the Company and Union will schedule 21 grievances weekly unless the parties agree otherwise. Should the number of grievances pending a Step II hearing exceed 200, the AEIF Executive Board and Industrial Relations shall meet to discuss methods on how to address the grievance backlog.

The parties will hear Step II grievances within the respective departments under the following guide-lines:

- a. Trustee and local union representatives,
- b. Industrial Relations and supervision present,
- c. The employee or employees involved may be present for the presentation of his (or their) particular grievance, together with other individuals who may be agreed upon by the parties as necessary to the proper consideration of the grievance,
- d. The Union is provided with the necessary documentation from within the department,
- e. The AEIF Vice President is provided a copy of the grievance settlement as noted on the grievance forms.

Grievances involving matters that are not within the control of the department shall be heard at Industrial Relations. The attendance of each grievance meeting shall be recorded by the Company and attached to the written disposition in this Step. Unless carried forward to a subsequent meeting by mutual consent of the parties, in this Step, the representative of the Plant Management shall render his decision as soon as practicable after consideration of the grievance in the Step II meeting and within not more than 30 days after the day on which the Step II meeting was concluded, or the [35] grievance will be considered granted on a non-precedent basis, except as an extension of this time may be agreed upon between designated representatives of the Union and the Plant Management. If the grievance is not resolved at Step II and not appealed to either Regular Arbitration or to Accelerated Arbitration within 30 days of receipt of the Step

II answer, the grievance is considered resolved and no further action may be taken, except as a written extension of this time may be agreed upon between an appropriate representative of the Union Executive Committee and the Plant Management.

### **Section F - Arbitration**

1. Either party to this Agreement shall have the right to refer to an impartial arbitrator any grievance (including the determination of the question under Section B, Paragraph 1, as to whether a particular dispute is or is not a proper grievance) which has not been satisfactorily settled in the foregoing steps, provided such reference is made by notification in writing within 30 days following the date of the Step II decision. The parties shall schedule the grievance within 60 days of the appeal and are required to hear the case within 12 months, unless resolved.

The impartial arbitrator shall render his award in writing within 30 calendar days from the date on which the grievance is heard by him. His decision shall be final and binding upon each of the parties hereto. The arbitrator shall have jurisdiction and authority to interpret and apply the provisions of this Agreement only insofar as necessary to the determination of such griev[36]ance, but he shall not have jurisdiction or authority in any way to change the provisions of this Agreement by alterations, additions to, or subtractions from the terms thereof.

3. The compensation and proper expenses of the impartial arbitrator shall be agreed upon between him and the parties hereto, and each of the parties shall be

responsible for, and pay to him, one-half of said compensation and expenses.

4. There shall be a permanent panel of ten (10) arbitrators mutually agreed upon by the Company and the Union. Each party retains the right to unilaterally remove one arbitrator from this permanent panel after that arbitrator has heard at least one arbitration. The parties may mutually agree to replace arbitrators on the panel.

5. The parties agree to arbitrate up to a maximum of 350 arbitration cases annually. Up to 125 grievances shall be scheduled in regular arbitration. All arbitration grievances shall be scheduled with the following conditions:

a. Any grievance scheduled to arbitration and then subsequently withdrawn, settled or heard in arbitration will be considered as part of the 350 annual cases.

b. Each discharge grievance filed on or after November 1, 1999 shall increase the maximum of 125 regular arbitration cases by one.

c. Each grievance the Union submits for scheduling to accelerated arbitration and the Company rejects for accelerated arbitration shall [37] increase the maximum of 125 regular arbitration cases by one.

(1) The following areas of dispute will be used as a guideline for the types of cases to be referred for consideration of the parties for presentation in accelerated arbitration: overtime, Supplemental

Agreement violations, holiday compensation, holiday scheduling, bereavement jury duty, personal days, supervisors performing bargaining unit work, reporting pay, allowed time, monthly Delegate meeting issues, sickness and accident benefits, seniority related to job preference, disqualification, Step I promotions, failure to break-in timely, Step II transfers, special assignments and forced loans. Other issues not mentioned above may be advanced to accelerated arbitration by mutual agreement.

6. In selecting an arbitrator for an arbitration case, the parties agree to the following:

a. The Union shall notify the Company of its intent to schedule arbitration of a particular grievance or grievances in writing.

b. Within 3 days of the aforementioned notice, the parties shall meet to determine if the parties can agree upon an arbitrator to hear the case.

c. If the parties fail to agree, the Union may notify the American Arbitration Association of its intent to have the arbitration case scheduled. Each party may specify that the [38] American Arbitration Association not appoint a (one) particular arbitrator to that case. The American Arbitration Association, upon the Union's notice, shall appoint the next available arbitrator from the panel described in Paragraph 4 above or the permanent panel specified in Section H of this article for accelerated arbitration.

7. Based on the 350 annual arbitration limit, set forth in Paragraph 5 of this Section, once a grievance is

scheduled for either regular or accelerated arbitration, unless the grievance subsequently is settled or withdrawn, the arbitration shall not be postponed except upon mutual agreement of the parties or upon order of the arbitrator. If a party should fail to appear for a scheduled arbitration, that party shall forfeit the arbitration and shall pay all fees of the arbitrator and court reporter. Forfeiture of the arbitration for the Union shall be withdrawal of the grievance without remedy. Forfeiture for the Company shall include the Arbitrator fashioning an appropriate remedy based upon the Union's remedy request.

8. The Company recognizes an appointed AEIF Arbitration Committee established from the current complement of released Union Representatives.

9. The Company and the Union Arbitration Committee, including the AEIF President and Vice President, shall meet weekly to review and discuss grievances and issues pending arbitration. It is intended that the Company and Union Arbitration Committee will attempt to resolve outstanding grievances appealed to [39] Arbitration and identify issues that the parties need to resolve.

10. The arbitration hearing shall be held under the American Arbitration Association's rules and procedures.

11. Within thirty (30) days of the signing of the Agreement, a list of thirty (30) arbitrators will be supplied to both parties. This list will be generated by the American Arbitration Association (AAA). From this group of thirty (30) the Company and the Union

shall agree to ten.

12. Each party will submit a list of acceptable arbitrators to AAA and AAA will determine the list of agreed-upon arbitrators from the lists to the parties. If the list exceeds the ten (10) arbitrators required, the parties will meet to determine which arbitrators will serve on the permanent panel and which arbitrators will serve as replacement arbitrators should either party remove an agreed-upon arbitrator from the permanent panel. If the parties do not agree on the ten arbitrators, additional lists will be obtained from the AAA and the process repeated until ten arbitrators are agreed upon. Should the Company and the Union be unable to agree upon an impartial arbitrator, the American Arbitration Association shall be requested to appoint an arbitrator in accordance with their established practice. Such appointment shall be final and must be accepted by both parties.

13. It is agreed that requests to submit post-hearing briefs by the parties must be made at the time of the hearing and may only be submitted if agreed to by the arbitrator.

#### [40]Section G - Other Limitations

1. It is agreed that a grievance which, as of the date of this Agreement, has been presented in writing and is in the process of adjustment under the grievance procedure of the prior Agreement, shall be considered and settled in accordance with the applicable provisions of that prior Agreement. Any grievance disposed of under prior Agreements may not be reopened or refiled by reason of changed provisions now embodied in this

## Agreement.

2. It is agreed that no grievance will be considered under the terms of this Article which would revoke, reverse, or otherwise alter the terms or conditions of any grievance previously answered. This understanding provides that where the Agreement has been incorrectly construed or applied, by mutual agreement the original case may be reopened and reviewed.

## Section H - Accelerated Arbitration

The following Accelerated Arbitration Procedure has been adopted by the parties, notwithstanding any other provisions of this Agreement and supplements the regular arbitration procedure set forth in Article VII, Section F. This procedure is intended to be one which is available for a more expeditious consideration of cases mutually recognized to involve the more common or routine issues having limited contractual consequence such as overtime, discipline of 3 days or less and job preference claims but, is not limited to the aforementioned. It is not intended for cases involving complicated or extraordinary contract issues, rates, incentives, or discharges.

[41]Grievances which have not been settled through Step II of the grievance procedure may be appealed to this Accelerated Arbitration Procedure. Any proposed appeal to this procedure shall be made within 30 days of the Step II decision. The parties shall schedule the grievance within 60 days of the appeal and are required to hear the case within 6 months, unless resolved. Within 10 days of the appeal, Industrial Relations may

object in writing to a specific case appealed to Accelerated Arbitration. The parties shall schedule any such case to Regular Arbitration in accordance with appropriate time limits.

The American Arbitration Association Expedited Labor Arbitration Rules shall apply to grievances processed under this procedure except that the Award of the Arbitrator shall include an opinion in summary form. The provisions for selection of the Arbitrator shall be those as set forth by the American Arbitration Expedited Labor Arbitration Rules.

Accelerated arbitration arbitrators will be selected from a list of twenty (20) arbitrators provided by the American Arbitration Association. The Union and Company will mutually agree to select five (5) local, permanent arbitrators from the list. Each party retains the right to unilaterally remove one arbitrator from this permanent panel after that arbitrator has heard at least one arbitration. The parties may mutually agree to replace arbitrators on the panel. The Arbitrator is to render his decision in writing within 7 days of the hearing.

The administrative fee of the AAA and the fee and expenses of the Arbitrator shall be borne equally by the Company and the Union.

[42]Further guidelines for this Accelerated Arbitration Procedure are as follows:

1. The Arbitrator shall have the same jurisdiction and authority as provided in Article VII, Section F.

2. If the hearing results in a conclusion by the Arbitrator or the parties that the issues need further attention and consideration due to their particular significance, the case shall be referred to the appropriate Step II representatives for disposition or arbitration under the regular arbitration procedure.

3. The decisions under this Accelerated Arbitration Procedure shall not establish a precedent and shall not be used in any grievance consideration at any step of the grievance or arbitration procedure.

#### **Section I - Expedited Arbitration (Contracting Out)**

1. The parties agree to resolve Contracting Out grievances filed prior to September 1, 1999, by applying the Expedited Arbitration process as outlined in Appendix X, Paragraph IV (Grievance Reduction) of the February 17, 1995 Settlement Agreement. Grievances to be presented as an issue to the Arbitrator will require agreement of the parties.

2. Any grievance not resolved through the Expedited Arbitration will be resolved through 1) [43] Regular Arbitration or 2) Accelerated Arbitration by agreement.

3. The above procedures to resolve Contracting Out grievances will be completed prior to November 1, 2003. Scheduling of the Contracting Out grievances will not be included as part of the 350 cases scheduled annually in accord with Section F, Paragraph 5 of this Article.[44]